88-1499

Supreme Court, U.S.
FILED
MAR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN ELMER JOHNSON,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WARREN R. WILLIAMSON
Utsinger and Williamson
2366 Front Street
San Diego, CA 92101
Telephone (619) 239-5188

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the constitutionality of the mandatory minimum sentencing provisions of Title 21 U.S.C. § 841(b)(1)(B) is of such importance it should be settled by this Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
DECISION BELOW	1
JURISDICTION OF THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
BASIS OF JURISDICTION IN THE DISTRICT COURT	4
REASONS FOR GRANTING WRIT	4
CONCLUSION	10
APPENDICES	
PROOF OF SERVICE	

TABLE OF AUTHORITIES

CASES

Baxstrom v. Herold,
383 U.S. 107 (1966) 5

In Re Foss,
10 Cal.3d 910 (1974) 9

McLaughlin v. Florida,
379 U.S. 184 (1964) 7

People v. Lorentzen,
387 Mich. 167, 194
N.W. 2d 827 (1972) 9

Reed v. Reed,
404 U.S. 71 (1971) 7

Solem v. Helm,
463 U.S. 277 (1983) 8, 9

CONSTITUTIONAL PROVISIONS

Amendment V 1, 2, 5

Amendment VIII 2, 7, 8, 10

Amendment XIV 2, 7

STATUTES

18 U.S.C. § 111	8
18 U.S.C. § 1751	8
18 U.S.C. § 2113	8
18 U.S.C. § 3231	4
21 U.S.C. § 841	2, 3, 5, 6, 8, 10
28 U.S.C. § 1254	1

RULES

Rules of the United States Supreme Court, 17, 20.1	1
Federal Rules of Criminal Procedure, 18	4

OTHER AUTHORITIES

H.R. Report No. 845, 99th Cong., 2d Sess. (1986)	6

DECISION BELOW

On December 1, 1988, the U. S. Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction for possessing marijuana with intent to distribute. (Appendix A). On February 3, 1989, the petition for rehearing was denied. (Appendix B).

JURISDICTION

This Court has jurisdiction of the petition for certiorari under 28 U.S.C. § 1254(1) and under Rules 17 and 20.1 of the Rules of the Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment V

"No person shall be ... deprived of life, liberty or property without due process

of law ..."

Amendment VIII

"Excessive bail shall not be required ... nor shall cruel and unusual punishment be inflicted."

Amendment XIV, Section 1

"No State shall ... deny to any person ... the equal protection of the laws."

Title 21 U.S.C. § 841

(a) [I]t shall be unlawful for any person knowingly or intentionally--

(1) to ... possess with intent to ... distribute ... a

controlled substance

(b)(1)(B)(vii) In the case of a violation of subsection (a) ... involving--100 kilograms or more of a mixture or substance containing a detectable amount of marijuana; such person shall be sentenced to a term of imprisonment which may not be less than five years ...

STATEMENT OF THE CASE

Petitioner was convicted of possessing for distribution more than 100 kilograms of marijuana. As a result, the sentencing provisions of 21 U.S.C. §

841(b)(1)(B) applied to his case. These provisions mandate a minimum sentence of five years, and deprive the sentencing judge of the power to impose a lesser sentence or to grant probation. On November 23, 1987, the district court sentenced Petitioner to five years in prison.

BASIS FOR JURISDICTION IN THE DISTRICT COURT

The U.S. District Court for the Southern District of California had jurisdiction over Petitioner's case under 18 U.S.C. § 3231 and Rule 18 of the Federal Rules of Criminal Procedure

REASONS FOR GRANTING WRIT

The mandatory minimum sentencing provisions of 21 U.S.C. § 841 are unconstitutional. They violate the Fifth Amendment's guarantee of due process of law, the Eight Amendment's prohibition against cruel and unusual punishment, and the Equal Protection Clause of the Fourteenth Amendment.

The sentencing provisions of 21

U.S.C. § 841(b)(1)(B) mandate minimum prison terms (with no probation) if a person is convicted of possessing for distribution more than certain defined amounts of a controlled substance. The district judge is forced to impose at least the designated minimum regardless of whether he or she feels such a sentence is necessary in order to achieve any of the recognized goals of sentencing.

The Due Process Clause of the Fifth Amendment requires that statutory classifications bear a rational relationship to their purpose. Baxstrom v. Herold, 383 U.S. 107, 111 (1966). The sentencing provisions at issue define categories of, or classify, punishment -- including minimum sentences -- based on amounts of controlled substances, alone. They do so without regard to the role of

the offender or the purity of the substance involved. Under 21 U.S.C. § 841(b)(1)(B)(vii) a person with a peripheral role who possessed one ounce of marijuana mixed in with a 100 kilogram haystack would have to get at least a 5 year sentence while a "kingpin" who possessed 99 kilograms of pure marijuana would not.

Congress, in enacting these sentencing provisions, focused on punishing those "who are responsible for creating and delivering very large quantities of drugs". H.R. Rep. No. 845, 99th Cong., 2d Sess. Part I at 11-12 (1986). The mandatory minimum sentencing provisions of 21 U.S.C. § 841, by ignoring relevant factors such as the role of the person involved and whether the controlled substance is pure or adulterated, bear no rational

relationship to this purpose. As a result, they violate Due Process.

The Equal Protection Clause of the Fourteenth Amendment also requires that statutory classifications (in this case, the categorization of offenders who must receive mandatory minimum sentences) be reasonable in light of their purpose. McLaughlin v. Florida, 379 U.S. 184, 190-191 (1964); Reed v. Reed, 404 U.S. 71, 75-76 (1971). For the reasons discussed above, the provisions of 21 U.S.C. § 841 which mandate minimum sentences based on the quantity of controlled substance, alone, are not reasonable in light of the statute's purpose: to punish those who are "responsible" for the distribution of drugs.

The Eighth Amendment prohibits cruel and unusual punishment, including sentences which are disproportionate to

the crime committed. Solem v. Helm, 463 U.S. 277, 284 (1983). Three factors are considered when analyzing sentences under the Eighth Amendment: the gravity of the offense and harshness of the penalty; how the sentence compares with those for other similar or more serious crimes; and how the sentence compares to those for similar crimes in other (i.e., state) jurisdictions. Id. at 290-291.

There are many instances where more serious federal crimes provide for punishments less severe than those mandated by 21 U.S.C. § 841. Some examples are armed bank robbery, 18 U.S.C. § 2113(a) and (d), assault on a federal officer, 18 U.S.C. § 111, and attempting to assasinate the president, 18 U.S.C. § 1751(c), none of which

provide for mandatory minimum sentences.[1]

The third factor discussed in Solem involves comparing the questioned provision to similar provisions in other jurisdictions. Both the California and Michigan Supreme Courts have disapproved legislation mandating punishment in drug cases. See, In Re Foss, 10 Cal.3d 910 (1974) (mandatory "no parole" provision improper under California Constitution as disproportionate to offense of sale of heroin); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972) (twenty year sentence for sale of marijuana violates

---

[1] The Solem Court noted nonviolent crimes are less serious than those marked by threats or actual violence. 463 U.S. at 292-293. Distributing marijuana is not a violent crime.

Eighth Amendment).[2]

CONCLUSION

This Court should grant review to consider the constitutionality of the mandatory minimum sentencing provisions of 21 U.S.C. § 841(b)(1)(B). Not only are these provisions suspect under a due process/equal protection analysis, they are also cruel and unusual in that they provide for punishment disproportionate to the offense to which they relate. Also, the fact that these provisions mandate lengthy prison terms without regard to the individual's role in the offense, background, or other factors traditionally considered relevant to

---

[2] In Lorentzen, the Michigan Supreme Court observed that the sentencing provision at issue was as applicable to a first offender as it was to a professional racketeer. The same is true of the mandatory minimum sentences provided for in 21 U.S.C. § 841(b)(1)(B).

sentencing, merits their review by this Court.

Respectfully submitted,

Date: 3 MAR 1989

WARREN R. WILLIAMSON
Utsinger and Williamson
2366 Front Street
San Diego, CA 92101
(619) 239-5188

Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America Plaintiff-Appellee v. John Elmer Johnson Defendant-Appellant	)	No. 87-5366 D.C. No. 87-500-01-K MEMORANDUM

Appeal from the United States District Court for the Southern District of California Judith Keep, District Judge, Presiding

Argued and Submitted November 1, 1988 Pasadena, California

Before: Schroeder, Reinhardt, and Leavy, Circuit Judges

Appellant John Elmer Johnson appeals from his conviction, following a conditional guilty plea, for possession with intent to distribute approximately 835 pounds of marijuana. Johnson was sentenced to five years in jail and fined fifty dollars under the mandatory

sentencing provisions of the Narcotics Penalties and Enforcement Act of 1986, 21 U.S.C. § 841(b). On appeal, Johnson argues that (1) the trial court erred in prohibiting him from carrying out certain experiments in preparation for a suppression hearing and that (2) § 841(b) violates the due process clause and the equal protection component of the Fifth Amendment and the prohibition against cruel and unusual punishment contained in the Eighth Amendment.[1] We affirm.

On April 29, 1987, two U.S. Border Patrol Agents, parked about ten miles south of the Temecula, California

---

[1] At oral argument, counsel for appellant conceded that recent Ninth Circuit decisions render his constitutional claims untenable at this level. See United States v. Savinovich, 845 F.2d 834, 839 (9th Cir. 1988). We therefore find it unnecessary to discuss his challenges to the Narcotics Penalties and Enforcement Act.

Immigration checkpoint, observed a Ford pickup truck equipped with a camper shell on its back heading North along Highway I-15. The side windows on the camper shell were darkened, and the rear window was obscured with a towel. As the truck passed the marked border patrol vehicle, the driver of the pickup rapidly shifted lanes and accelerated. Because the I-15 corridor is commonly used to transport illegal aliens and the truck fit the profile of a smuggler's vehicle, the agents pulled out and followed Johnson's truck for approximately one mile. During that interval, they noticed that the truck was "riding low," indicating the presence of unusually heavy cargo. After the truck exited I-15 at a point commonly used by smugglers to avoid the Temecula checkpoint, the agents stopped the truck and requested permission to search the

vehicle. Johnson consented. Between 800 and 850 pounds of marijuana were uncovered under the camping shell.

After his arrest, appellant moved to suppress the introduction of the marijuana into evidence. He argued that the Border Patrol agents lacked a reasonable suspicion for stopping his vehicle. See United States v. Cortez, 449 U.S. 411, 417-18 (1981). To support his theory, Johnson petitioned for use of his pickup truck to conduct experiments that might impeach the government's assertion that the "nose of the truck was up in the air and the back slanted downward." Specifically, Johnson requested the opportunity to videotape his impounded truck, laden with 850 pounds, cruising at 60 miles an hour along I-15. The trial court rejected his request but permitted Johnson to

experiment under controlled conditions in the parking lot of the Encinitas Sheriff's Station. Johnson now contends that the district court erred in denying him the opportunity to fully perform his tests.

Admission of experimental evidence is within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of discretion. Champeau v. Fruehauf Corp., 814 F.2d 1271, 1278 (8th Cir. 1987); United States v. Polizzi, 801 F.2d 1543, 1555 (9th Cir. 1986). Although this case does not involve the introduction of experimental evidence but instead the opportunity to produce that evidence, we conclude that this analytical distinction is irrelevant to the appropriate standard of review; the control of seized evidence for the purposes of evidentiary experiments lies

within the sound discretion of the trial judge.

In this case, appellant was allowed to use his truck for the purposes of a limited experiment. His hired investigator was permitted to take the truck out to the Sheriff's parking lot, to load over eight hundred pounds of sand into the flatbed portion of the impounded vehicle, and to measure and photograph the loaded - and unloaded - truck to determine the differential. The resulting evidence, including the investigator's testimony as to the relative appearances of the loaded and unloaded trucks, was introduced at the suppression hearing to impeach the testimony of the Border Patrol agents. No significant limitations were placed on the introduction of the results of these tests or the observations of appellant's

experts. It is entirely speculative to argue that taking the truck out onto Highway 15 would have produced different or more dramatic results.[2]

Against this backdrop of limited marginal relevance, the district court had to weigh the time and expense of

---

[2] Appellant's experiments showed that the truck rode only a half inch lower after loading the 880 pounds of sand. Nevertheless, the trial court still credited the accuracy of the agent's testimony. Appellant does not, and cannot, argue that the highway experiment would have revealed any results substantively different from the parking lot demonstration; on appeal, his suggestion appears to be that the visual effect of the truck moving at 60 miles an hour might have influenced the trier of fact. Given the fact that Judge Keep thought that an experienced Border Patrol agent might be able to detect differences as subtle as one half inch, it is hard to imagine that the videotape would have had any value for the defendant. Even if appellant had discredited that part of the agent's testimony, there appears to be ample evidence to support the stop under the reasonable suspicion test of United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

taking the truck - under guard - onto the interstate highway. Even though the defense offered to reimburse the government for any costs, the diversion of police personnel from normal duty involves a resource expense that could reasonably outweigh the very limited benefits of the more elaborate experiment designed by appellant. Under these circumstances, we cannot say that the trial court abused its discretion in limiting Johnson's experiments.

AFFIRMED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America Plaintiff-Appellee v. John Elmer Johnson Defendant-Appellant	)	No. 87-5366 D.C. No. 87-500-01-K O R D E R

Before: Schroeder, Reinhardt, and Leavy, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO. _____

_____

JOHN ELMER JOHNSON,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

_____

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

WARREN R. WILLIAMSON, being first duly sworn, deposes and says that he is a member of the Bar of the Supreme Court of the United States; that on March 3, 1989, the original and forty (40) copies of the petition for writ of certiorari in the above-entitled case was deposited in a United States post office mail box located in San Diego, California, postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said petition for writ of certiorari, and with three (3) additional copies of the petition and affidavit of

mailing on counsel for respondent:

The Honorable William C. Bryson
Acting Solicitor General
of the United States
Department of Justice
Washington, D.C. 20530

Dated at San Diego, California, this 23rd day of February, 1989.

WARREN R. WILLIAMSON
Affiant

Subscribed and Sworn to before me this 23rd day of February, 1989.

Janet Marie Werdowatz
Notary Public in and for said County and State.